

Holiday Inn of Santa Maria and Culinary Alliance and Bartenders Union, Local No. 703, Hotel & Restaurant Employees and Bartenders International Union, AFL-CIO. Cases 31-CA-8817 and 31-CA-9593

December 11, 1981

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND
MEMBERS JENKINS AND HUNTER

On July 28, 1981, Administrative Law Judge James T. Barker issued the attached Decision in this proceeding. Thereafter, the General Counsel filed an exception.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exception and has decided to affirm the rulings, findings, and conclusions¹ of the Administrative Law Judge and to adopt his recommended Order, as modified herein.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified herein, and hereby orders that the Respondent, Holiday Inn of Santa Maria, Santa Maria, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(c):

“(c) In any like or related manner interfering with, restraining, or coercing employees in the ex-

¹ The General Counsel has excepted to the failure of the Administrative Law Judge to state, in his Conclusion of Law 4, that by constructively terminating Paul Flores on March 2, 1979, Respondent violated Sec. 8(a)(1) and (3) of the Act. The evidence supports the conclusion that Respondent's conduct violated said section, and the analysis of the Administrative Law Judge clearly indicates that his omission was by inadvertence only. We hereby modify the Administrative Law Judge's Conclusions of Law accordingly.

² In par. 1(c) of his recommended Order, the Administrative Law Judge included a broad cease-and-desist order against Respondent. We find it unnecessary to impose such a broad order against Respondent. As the General Counsel has not demonstrated that Respondent has a proclivity to violate the Act, or that Respondent has engaged in such widespread or egregious misconduct as to demonstrate a general disregard for its employees' fundamental statutory rights, a broad order is not warranted here. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). Accordingly, we will modify the Administrative Law Judge's recommended Order by substituting narrow cease-and-desist language for the broad language used by the Administrative Law Judge. There is no need to similarly modify the Administrative Law Judge's notice, since it already contains narrow cease-and-desist language.

In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

ercise of rights guaranteed in Section 7 of the Act.”

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT, by inferring a threat to their job security, instruct our employees not to contact or consult with the Union, or representatives thereof, concerning problems or matters relating to their terms and conditions of employment, without first consulting with supervision or management with respect thereto.

WE WILL NOT constructively discharge employees for contacting the Union concerning overtime pay or any other matter relating to their wages, hours, or terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL offer Paul Flores, who was constructively discharged on March 2, 1979, immediate and full reinstatement to his former position or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

WE WILL make Paul Flores whole for any loss of earnings, plus interest, he may have suffered as a result of having been constructively discharged.

HOLIDAY INN OF SANTA MARIA

DECISION

STATEMENT OF THE CASE

JAMES T. BARKER, Administrative Law Judge: This case was heard before me at Santa Maria, California, on January 20, 21, 22, 28, and 29, 1981, pursuant to an order consolidating cases, consolidated amended complaint and notice of hearing issued on July 22, 1980, by the Regional Director of the National Labor Relations Board for Region 31. The charge in Case 31-CA-8817 was filed by the Culinary Alliance and Bartenders Union, Local No. 703, Hotel & Restaurant Employees and Bartenders International Union, AFL-CIO, hereinafter called the Union, on March 13, 1979, and was duly served upon Respondent; and the charge in Case 31-CA-9593 was

filed by the Union on December 4, 1979, and service on Respondent was duly accomplished.¹ The parties were represented by counsel at the hearing and were provided full opportunity to make opening and closing statements, to examine and cross-examine witnesses, to introduce relevant evidence, and to file briefs with me. Counsel for the General Counsel and counsel for Respondent filed briefs with me.

Upon the basis of the entire record, the briefs filed in this matter, and my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

At all material times Respondent has been a corporation duly organized under the laws of the State of California, with an office and principal place of business located in Santa Maria, California, where it is engaged in the operation of a hotel providing food and lodging to guests.

In the course and conduct of its business operations, Respondent annually purchases and receives goods or services in excess of \$2,000 from sellers or suppliers located within the State of California, which sellers or suppliers receive such goods in substantially the same form directly from outside the State of California. Additionally, in the course and conduct of its business operations, Respondent annually derives gross revenues in excess of \$500,000.

Upon the foregoing facts, which are not in dispute, I find that at all times material herein Holiday Inn of Santa Maria has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent concedes, and I find, that at all times material herein the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The consolidated complaint gives rise to the following basic issues:

1. Whether Respondent violated Section 8(a)(1) and (3) of the Act by reducing the pay of Paul Flores on or about February 1, and by constructively discharging Flores on or about March 2.

2. Whether Respondent unlawfully terminated Deborah Mastriano on or about November 28, in violation of Section 8(a)(1) and/or (3) of the Act.

3. Whether Respondent violated Section 8(a)(1) of the Act by threatening to terminate Flores if he took complaints to the Union; by instructing employees in a meeting to bypass the Union and register any complaints directly with management upon threat of termination; and

by separately instructing an employee to bypass the Union and take complaints directly to management.

Respondent denies the commission of any unfair labor practices and affirmatively contends, in substance, that Flores' termination was voluntary and not constructively caused. Further, Respondent asserts that Mastriano was terminated because she was grossly insubordinate and, in any event, the General Counsel failed in this proceeding to establish a *prima facie* showing that Mastriano's protected concerted activity was a substantial or motivating factor in her termination.

B. Pertinent Facts

1. Background facts

Stock ownership of Respondent is vested in seven stockholders, none of whom has professional training or experience in the operation of a hotel or restaurant enterprise. Prior to 1978 management of the Santa Maria facility was vested in a professional manager, with oversight and ultimate operational authority residing in the seven-member board of directors. In November 1978 the professional manager resigned following disclosures of improprieties in the operation of the hotel, including its restaurant and bar facility. In close conjunction with this event three of the stockholders, representing a 64-percent ownership of the total outstanding shares, formed an executive committee to assume control of the enterprise. Roger Ikola, a medical doctor specializing in the practice of pediatrics, became one of the members of the executive committee. Dr. Ikola's stock ownership was slightly in excess of 20 percent of the outstanding shares. For a transitional period of approximately 5 days, the day-to-day management of the hotel was vested in an interim manager. Key personnel had left following the departure of the prior manager and other personnel resigned in the aftermath. Then, the interim manager resigned for reasons of ill health. To conduce to the orderly conduct of business, Dr. Ikola identified the key personnel remaining in the various phases of the hotel operation and met with them. Deborah Mastriano was one of the individuals who attended this meeting at which Dr. Ikola outlined the problems confronting the hotel. He instructed the individuals present to report directly to the executive committee on matters pertaining to the operation of their area of responsibility and to take direction from the executive committee. After the meeting, Dr. Ikola met separately with Mastriano who had been identified to him as a senior employee assigned to the bar operation. Dr. Ikola charged Mastriano with the responsibility of eliminating the theft of liquor and other impermissible practices in the bar which had come to Dr. Ikola's attention. It was in this framework that Bruno Fava was employed to become manager of the Santa Maria facility.

At the time he was selected by the executive committee to become manager of the Santa Maria hotel operation, Fava had completed approximately 18 years of professional training in all phases of hotel management. Prior to assuming managership of Respondent's operations in December 1978, Fava had served approximately 10 years as general manager of the Vandenberg Inn, a

¹ Unless otherwise specified, all dates herein refer to the calendar year 1979.

principal hotel operation situated in Santa Maria. For approximately 6 months in 1977-78, Deborah Mastriano had worked as a waitress at the Vandenberg Inn.

The members of the executive committee hired Fava with knowledge of his track record of successful management at the Vandenberg Inn. At the outset, the board of directors instructed Fava to bring the operation under control by developing a chain of command, coordinating closely with the owners as a management team, employing good personnel, and running a "tight ship" in order to avoid the breakdown of discipline and proper supervision, which had contributed to the thefts of supplies and other breaches leading to citations and warnings by health authorities and the Holiday Inns of America, Inc., as well as to a substantial diminution in revenues. Union considerations played no part in either the decision of management to employ Fava as manager or in the formulation of instructions to him.

At pertinent times, Respondent and the Union were parties to a collective-bargaining agreement effective from April 1, 1975, until March 31, 1980. The agreement contained a union-security provision. The relationship between the Union and Respondent was a generally harmonious one. The Vandenberg Inn was a party to the collective-bargaining agreement during the period of time Bruno Fava served as manager there and in that capacity Fava had contacts with Ted Zenich, who served as secretary/treasurer of the Union. Bruno Fava assisted in negotiating the collective-bargaining agreement which became effective in 1975 for a term of 5 years, and he became co-chairman together with Ted Zenich of the Health and Welfare Trust Funds created and maintained pursuant to the collective-bargaining agreement.

Fava assumed management of Respondent's hotel operation with a commitment to a concept of systems management calculated to assist management in carefully controlling the purchase and dispensing of food and beverages; the utilization of overtime or premium hours; and the acquisition and disposition of physical property. In the initial weeks of his tenure, Fava devoted his principal efforts to correcting the most pressing problems constituting a threat to the retention of the franchise. He recruited his uncle, Frank Fava, an experienced chef with approximately 50 years of experience in the restaurant industry, to serve as executive chef and to assume direct responsibility over the operation of the kitchen and restaurant facility. Fava had served in the capacity of executive chef under Bruno Fava at the Vandenberg Inn. Soon thereafter Bruno Fava removed the timeclocks which had been in use under previous management and instituted the use of daily timesheets requiring employees to sign in and out and to receive independent verification from supervision of hours claimed as overtime. Moreover, Fava instituted a system of ticket control in the cocktail lounge and dining room. Fava had a reputation in the community for running a "tight ship" and some of the personnel at Respondent's facility had worked under him at previous times at the Vandenberg Inn. A quantum of job-related apprehension concerning the future course of events existed among Respondent's employee complement during the early days of Fava's tenure as manager, and Fava was aware of this.

During the initial days of his managership at Respondent's Santa Maria facility, Fava looked for departmental leadership to the department heads and senior employees who remained after the transition in management. Thus, Deborah Mastriano served as bar manager, Richard Castaneda as chef, and until October 1979 Constance Antioque remained as sales and catering director.² Antioque possessed responsibility for booking and catering of all banquets, for hiring banquet personnel and scheduling their work, and for overseeing their performance in serving banquets. Castaneda relinquished his responsibilities as head of the kitchen operation when Frank Fava assumed his duties as executive chef.

In the spring of 1979 Antioque, Phyllis Slaughter, and Lisa Ziemba conversed together concerning the advantages or disadvantages of continued union representation of the employees. As a result of their conversation, they agreed to speak with employees to determine their reaction. At the time in question Slaughter was serving as the head waitress on the night shift in the dining room and Ziemba was the dining room hostess. She is the daughter of one of the stockholders of Respondent. Antioque spoke with approximately 10 employees and inquired whether they were satisfied with the Union and whether they desired to continue to be union members. She had received no instruction from Bruno Fava to undertake this endeavor but she did tell him of her activity. Fava neither encouraged nor discouraged the process.³

2. The alleged proscribed conduct

a. The employee meeting

During the first week of December 1978, Bruno Fava called a meeting of employees. The meeting was held in one of the banquet rooms and was attended by dining room, kitchen, and bar personnel. Department heads such as Constance Antioque, Richard Castaneda, and Deborah Mastriano attended the meeting. Prior to calling the meeting, Fava had received information indicating that employees were contacting the investors directly concerning matters taking place in the transition, and he had received information indicating a quantum of employee resistance to his hire as manager and a fear of losing their jobs.

At the outset of the meeting, Fava introduced himself as the new manager of the establishment and informed the employees, in substance, that the operation was in a state of transition and that effort was being devoted to remedying problems and conditions which had accumulated under the previous management. Fava assured the employees that he was making no major changes but asserted that it was necessary for the employees to work as a team. Fava introduced the department heads and stated

² The parties stipulated that at relevant times Antioque was a supervisor within the meaning of the Act. Prior to becoming sales and catering director in October 1978, she had served as a waitress in the dining room.

³ The foregoing is based on a composite of the testimony of Diane Antioque, Linda Stout, and Cheryl Barr. The thrust of Antioque's testimony is to the effect that this undertaking was a voluntary one and not at the directive of management. The testimony of Linda Stout provides an inadequate basis to support a finding that the activity was undertaken pursuant to instructions from Bruno Fava.

that he was organizing the operation on a chain-of-command concept which should be followed both in making suggestions for improving the operation and for lodging complaints. Fava admonished the employees to follow the chain of command by communicating first with the department heads. He added that his door was open to employees for discussion and that, if they could not receive satisfaction from their department heads, they were free to consult with him. Fava added that the employees should follow the chain-of-command concept in seeking to resolve their work-related problems and should consult first with him before going to the Union. Fava stated that if the employees did not follow his instructions, their job would be in jeopardy.⁴ In this context he stated that he had known and dealt with Ted Zenich for a number of years. Fava added that Richard McGuinness would be limited to 2 days a month in which to collect dues on the premises. The employees posed questions to Fava during the course of the meeting, and he gave answers. The comments made by Fava in the early portion of the meeting followed a format he had used on previous occasions in prior years at other facilities.⁵

b. Castaneda seeks time off

During the months of December 1978 and January 1979, Castaneda was working long hours. He communicated his desire for time off to Frank Fava who, in effect, requested Castaneda's forbearance. Finally, in late January Castaneda spoke with Mrs. Roger Ikola, the wife of one of the principal stockholders, and stated his desire to take some time off. Mrs. Ikola stated that she would speak with Bruno Fava concerning the matter. The following day Bruno Fava approached Castaneda and told him that he had the following day off and to have a "nice day." A few days later Bruno Fava approached Castaneda and told him not to speak with Mrs. Ikola about time off but to talk with Frank Fava. Subsequently, Castaneda observed Frank and Bruno Fava speaking together in Frank Fava's office. Thereafter, Frank informed Castaneda not to talk to Mrs. Ikola but to speak with him.⁶

⁴ Fava had met earlier with department heads and had issued essentially the same instructions to them.

⁵ The foregoing is based upon a composite of the testimony of Bruno Fava, Constance Antioque, Richard Castaneda, Cheryl Barr, Steven Oclaray, Elinor Bewlay, and Linda Stout. I have also considered the testimony of Deborah Mastriano. I credit the testimony of Fava and Antioque denying the testimony of Mastriano, Bewlay, and Stout to the effect that Fava stated, in terms, that employee resort to the Union would result in their termination. The testimony of Castaneda and Barr supports, by implication, Fava's denial of any statement so explicit in terms or meaning, for their testimony, like that of Oclaray, reveals that Fava appealed to the employees to come first to him with their problems before going to the Union. Nothing in his remarks *per se* foreclosed resort to the Union.

⁶ The following is based upon the credited testimony of Richard Castaneda. I have also considered the testimony of both Bruno and Frank Fava with respect to the series of conversations which they had concerning Castaneda's time off. I do not credit the testimony of Castaneda to the effect that in separate conversations both Frank Fava and Bruno Fava instructed him not to go to the Union concerning time off. In the first instance, I discern no predicate for the instruction which Castaneda asserts was issued to him by Frank and Bruno Fava. Castaneda had not sought to invoke union aid nor had the Union on the terms of the collective-bargaining agreement been alluded to in the conversations between Castaneda and Bruno and Frank Fava. Moreover, Frank Fava specifically

c. Flores contacts the Union

Paul Flores was employed in the capacity of a cook in Respondent's operation from June 1977 until March 2, 1979, with an interruption of service between November 1977 and April 1978. Flores was compensated on an hourly basis until May 1978 when he was placed on salary and informed by the then chef that he would earn \$700 per month. In the fall of 1978, Flores' salary was raised to \$750 per month. Prior to December 1978, Flores occasionally worked overtime, and he was compensated for his overtime work. Flores was a member of the Union.

Incident to Frank Fava becoming executive chef, Flores commenced working a longer workweek than the 5-day week which had previously prevailed. This intensified schedule of work lasted through December and into January and motivated Flores to approach Frank Fava seeking both a reduction in his total hours and Sundays off for religious observance. Flores also informed Frank Fava that his paychecks had not included overtime compensation. Fava told Flores he would look into the matter, but suggested that Flores speak directly to Bruno Fava. Flores did not do so.

On or about January 20 Flores received his paycheck and approached Brenda Guisinger, one of three bookkeepers then employed.⁷ He informed Guisinger that his check did not contain overtime compensation which was due him. Guisinger said that she would look into the matter and she informed Bruno Fava of Flores' complaint. Fava examined Flores' personnel file, and Fava noted that Flores was a salaried employee. He asserted that it was not the policy to pay overtime to salaried employees but instructed Guisinger to check with Frank Fava. Guisinger did so, and Frank Fava confirmed that Flores had worked overtime. Guisinger transmitted this information to Bruno Fava and Fava instructed her to pay Flores. Guisinger went to her office and calculated the amount which she believed was due Flores and spoke with Flores informing him of the amount to which she believed he was entitled. Flores became upset and spoke to Guisinger in a loud voice. He claimed that the amount was quite insufficient and that the Union was "going to hear about it." Guisinger responded that she had perhaps miscalculated the amount and noted that she was in the process of learning her job.⁸ Guisinger reported to Bruno Fava the fact that Flores was upset and that she had apparently miscalculated the amount due Flores. Bruno became visibly upset and alluded to the fact that salaried employees were not paid overtime. However, he instructed Guisinger to pay Flores. Guisinger took the matter to one of the more experienced payroll bookkeepers

ly and credibly denied his admonishing Castaneda about union contacts, and Bruno Fava impliedly denied having issued such an instruction. I am convinced upon my observation of Castaneda as he testified before me at the hearing that he rationalized that portion of his testimony relating to warnings issued by the Favas against union contacts, and I do not credit it.

⁷ Paychecks were normally received on the 5th and 20th of each month.

⁸ Guisinger had previously handled accounts receivable and was in the process of learning payroll at the time in question. She also worked at the front desk.

ers who calculated the sum due Flores, and Guisinger learned that she had, in fact, erred in her earlier calculations.⁹

Subsequently, during the height of the lunch hour, between 12:15 p.m. and 1:15 p.m., Bruno Fava went into the kitchen as part of his normal daily routine. As he entered the kitchen, he observed order tickets placed at the cook's station by waitresses awaiting Flores' attention. At the same time, he observed Flores speaking on the telephone and heard him ask for Ted Zenich. The phone at which Flores was speaking was located proximate to the kitchen entrance which Fava had used and, upon hearing Flores speaking, Fava told Flores to put the phone down and go to his work station. Fava added that the kitchen was busy, and he should make his phone calls on his own time. Nothing further was said. Subsequently, at approximately 2 p.m. or soon thereafter, Fava returned to the kitchen and spoke with Flores. He apologized for shouting at him earlier and explained that he had done so because the phone call had taken place during a busy period. Fava asserted that Flores should have waited until the proper time to inform the Union of any problems, rather than calling during the peak luncheon period. Fava then asked Flores if he was satisfied with the overtime compensation reflected in the revised check. Flores stated that he was.¹⁰ At this point in the conversation, Fava told Flores that he was going to have to put him "back on to a contractual wage." Fava stated that he was doing this because it was his understanding, in substance, that the hours of salaried employees tended to offset and balance out and therefore they were not compensated for overtime on those occasions when they worked extra hours. Flores indicated his acquiescence in

Fava's decision. As Fava and Flores conversed together they were observed by Castaneda from across the kitchen.¹¹

¹¹ The foregoing is based primarily upon the credited testimony of Bruno Fava. I have considered the testimony of Paul Flores and Richard Castaneda only to the extent that it is consistent with the foregoing findings. I have also considered the testimony of Frank Fava insofar as it serves to fix the time of the directive given Flores by Bruno Fava relating to his use of the telephone. In this latter connection, I specifically reject the testimony of Flores and of Castaneda to the effect that the directive and confrontation transpired prior to the lunch period. With respect to this facet of the case, Castaneda impressed me as a witness endeavoring diligently to assist Flores and the Union in the prosecution of the instant case. As against Flores' recollection of the time sequence, the convincing testimony of Bruno Fava finds credible and persuasive support in that of Frank Fava, and I am convinced that their testimony was not fabricated. With respect to the substance of Fava's remarks, I credit his version for I am unable to conclude that a manager of his experience, sophistication, and long-term involvement in dealing with collective-bargaining representatives would have articulated the direct threat which the testimony of Flores describes. I find that Flores embellished his testimony to serve his own pecuniary interest and that Fava's admonition to him was communicated in the terms which Fava testified it was. Contrary to the General Counsel, nothing in Fava's pretrial affidavit or his witness stand testimony with respect thereto lends credence to the contention that Fava eavesdropped on the conversation before pouncing on Flores with malice of forethought, so to speak. Fava's testimony establishes that his statement to Flores was direct and brief, and Flores' testimony supports this. Moreover, nothing in Flores' testimony suggests that he first dialed information for the number of the "Culinary Union" prior to placing his phone call wherein he requested to speak to Zenich. Upon this record, I am unable to indulge the assumption which the General Counsel requests. Nor do I indulge the General Counsel's interpretation of the reference "reaffirmed" contained in Bruno Fava's pretrial affidavit. The interpretation warranted by the record as a whole, and the one which I apply, is that the reaffirmation alluded to was of his earlier decision and instruction to Guisinger and had no reference to any earlier comment to Flores. In sum, taking into consideration the state of mind of both Fava and Flores at the time the telephone conversation transpired, and evaluating the experience and insight into the areas of permissible dialogue which Fava undoubtedly brought to the instant occasion, I conclude that the testimony of Bruno Fava is a more reliable gauge of the content of the exchange than is that of Flores'.

Moreover, the testimony of Castaneda attributing to Frank Fava a combination of adverse comments concerning Flores' call to the Union and admonitions to Castaneda not to contact the Union is rejected. Fava credibly denied these attributions, and my observations of Fava's personality and nature convinces me that, contrary to Castaneda, Fava did not allude to Flores as "a little bastard" and state that Flores had called the Union.

In crediting the testimony of Bruno Fava with respect to his reapproachment to Flores at approximately 2 o'clock on the afternoon in question, I have evaluated the evidence establishing that Flores was bona fide convinced that he was entitled to overtime and, in that context, have weighed the acquiescence of Bruno Fava in directing the payment of any proper amount due Flores. In this connection, however, the evidence preponderates in favor of a finding, which I make, that prior to January 20 Bruno Fava had not theretofore been aware of Flores' status as a salaried employee and, as a matter of management predilection, reached a conclusion before the telephone episode that Flores, as a salaried employee, was required either to honor flexibility in the work schedule without resort to overtime or, on the other hand, be treated as an hourly employee and be accorded overtime. In a related sense, I credit Guisinger and the inferences drawn from the testimony of Bruno Fava that Fava spontaneously evinced surprise and dissatisfaction of the concept of compensating on a salaried basis a cook in Flores' job category. In concluding that Fava spoke to Flores in a conciliatory tone on the afternoon of the day in question and on that occasion advised Flores that he was being placed on hourly compensation, I credit Bruno Fava. I base this credibility resolution upon a further finding supported by the credited testimony of Bruno Fava and Brenda Guisinger that before the telephone incident and prior to speaking with Flores in the afternoon Fava had reached the decision to place Flores on hourly wages.

⁹ The foregoing is based on a composite of the testimony of Paul Flores, Frank Fava, Bruno Fava, and Brenda Guisinger. To the extent that the testimony of Flores departs from that of the other witnesses, particularly Guisinger and Frank Fava, as to chronology of events surrounding his protest to Guisinger over the amount of overtime pay initially calculated, I reject Flores' testimony. Moreover, I specifically credit the testimony of Frank Fava to the effect that he advised Flores to speak directly with Bruno Fava concerning his overtime claim, and I do so upon my conviction that Frank Fava testified accurately and credibly that it was not his practice to become involved in matters of pay and compensation but routinely left those to front office resolution. Additionally, I credit Guisinger's testimony that, in speaking with Bruno Fava, she did not tell Fava that Flores had threatened to contact the Union over the overtime issue. I found Guisinger to have been a credible and reliable witness who manifested no bias by endeavoring to shape her testimony or shade the truth. I am convinced that when she reported to Bruno Fava that Flores was upset over the amount of overtime pay proffered she was concerned not with Flores threat to contact the Union but with the accuracy or inaccuracy of her own computation of the pay figure. She was inexperienced in payroll work and her reaction to Flores' remarks were entirely self-oriented. I conclude that, consistent with Guisinger's testimony, her accounting of her discussion with Flores on the matter was as terse and abbreviated as her testimony would suggest, and that Fava's response was as direct and as instructive as his testimony and that of Guisinger indicate. Contrary to the General Counsel, Bruno Fava's testimony is not devoid of any support for the finding that he instructed Guisinger to place Flores on "union scale." He testified quite directly that when he learned that Flores was on salary he felt a precedent he had established with respect to Castaneda was being ignored and decided it was time to put Flores on the contractual rate. While Fava's testimony was sometimes imprecise and conceptual in nature, it is a fair inference, which I have indulged, that, as Guisinger testified, he translated his reaction into a specific directive.

¹⁰ I am convinced that Flores so stated because he felt disinclined to challenge Fava on the issue at that time.

d. The alleged termination of Flores

The contractual wage rates in effect in January and February 1979 provided for compensation of the following classifications at the hourly rates shown:

Dinner cook—\$4.25.5
Second cook—\$4.04
Broiler cook—\$3.82
Fry cook—\$3.60

When the telephone incident occurred Flores was receiving a salary of \$750 per month, or \$4.37 per hour based on a workweek of 40 hours. The paycheck which Flores received on February 5 representing his compensation for the pay period January 16 through January 31 represented compensation at \$4.25 per hour. This rate was used by Guisinger in an effort to comply with Fava's instruction to pay Flores at union scale. In checking the payroll on payday Fava noted the rate and called the three payroll clerks into his office and admonished them that he had directed Flores be put on union scale. Accordingly, Guisinger applied the contractual wage applicable to the fry cook classification in preparing Flores' next paycheck. Subsequently, on February 20 Flores received his paycheck covering the 2-week period February 1 through February 15, and it reflected an amount representing an hourly rate of \$3.60 per hour. Upon a receipt of his paycheck on February 20, he protested to Bruno Fava who instructed him to speak to Frank Fava. He did so and Frank Fava showed him the contractual rate schedule. Flores protested that he was being given the "bottom figure" which he characterized as "ridiculous" in light of his experience. Frank Fava agreed to pay him \$3.75 per hour. Flores walked away.

Soon thereafter Flores, spoke with Frank Fava in Fava's office and told him that he was giving him 2 weeks' notice. Flores stated that he was working too hard, that too much work was expected of him, and that the pay he was receiving as a result of the adjustment resulted in his "not making enough money." Fava responded by noting, in substance, that improvements had been made in the operation and staffing of the kitchen operation and that an employee had been hired to make salads and cold sandwiches, thus easing the work burden for Flores. Fava did not endeavor further to dissuade Flores but advised him that, if a qualified employee became available in the next 2 weeks, he would employ him. He added that if this occurred, he would have to terminate Flores.

On February 27 Frank Fava hired a breakfast cook whom he considered fully qualified. Fava instructed the new employee to commence work the following day, and he told the payroll department to prepare Flores' checks. Flores was compensated at the rate of \$3.75 per hour for his work through February 28, and another check was issued dated March 2, 1979, compensating Flores for 16 additional hours of work at the rate of \$3.75 per hour.

Flores credibly testified that he gave notice of his intention to resign because he felt that in so doing he could "jar" Fava into raising his wages to an hourly rate more akin to that represented by his previous salary. Fava cre-

dibly testified that he hired a replacement for Flores when a qualified applicant presented himself because qualified help was in short supply. When Flores proffered his resignation, he had not secured employment elsewhere, nor had he secured another job on March 2 when he left Respondent's employ.

As found, the three paychecks received by Flores on February 2, 20, and 28, respectively, reflected hourly wage rates of \$4.25, \$3.60, and \$3.75. Upon learning of these variations in hourly pay rates, Bruno Fava verbally chastised the staff, comprised of one experienced payroll clerk and two relatively inexperienced clerks.¹²

e. Mastriano terminated

(1) Employment history

Deborah Mastriano was employed by Respondent from May 1978 until November 28, 1979, when she was terminated. She was employed as a bartender on the day shift and, as found, Mastriano served as bar manager.

¹² The foregoing is based on a composite of the credited testimony of Frank Fava, Paul Flores, Brenda Guisinger, and documentary evidence of record. In crediting the testimony of Paul Flores regarding his motivation in giving his 2 weeks' notice, I have evaluated the suggestive nature of a key question leading to Flores' specification of his rate of pay as a factor in his decision. Nonetheless, being convinced that the total context of Flores' testimony is such as to establish his wage rate as a factor in his decision, I have reached the findings of fact above made. However, in all other respects I credit Flores' testimony only to the extent that it is consistent with the foregoing findings. Initially, I became convinced as I observed Paul Flores testify at the proceeding before me that Flores was lacing his testimony liberally with rationalizations and extenuations which he knew to be harmful to the defenses being interposed by Respondent and fully supportive not only of his own pecuniary interest in this matter but also of the rationale of antiunion propensities on the part of Bruno Fava so foundational to the General Counsel's case. Flores' attributions to Bruno Fava and Frank Fava of direct, undisguised, and blatant expressions of hostility toward the Union and union-based motivation for the removal of Flores from salary and a reduction of his equivalent hourly wage rate exemplify the excesses of Flores' testimony, and this testimony is rejected. Moreover, my separate evaluations of Frank Fava and of Bruno Fava, as I observed them testify before me, provides insufficient foundation for the conclusion that either of them harbored resentment or hostilities toward the Union, or toward the concept of collective representation. Nor does this evaluation of them and their sworn testimony support the conclusion that either of them was so naive and lacking in judgment or self-control as to have articulated in specific terms the improper, union-related motivation for their wage actions, as Flores' testimony suggests. Particularly is this so here where Flores has manifested by his own actions a disposition or willingness to seek the assistance of the Union in matters pertaining to his own employment. In crediting the testimony of Frank Fava with respect to the exchange between him and Flores signifying Flores' severance, I do so for the reason that I consider Fava's account both of the conversation wherein Flores gave notice of his intention to quit, and of the severance interview, to be intrinsically credible. Moreover, Fava's accounts comport with the logical realities that then pertained. Fava had worked diligently to improve the operation of the kitchen, and had made demands on himself and other kitchen personnel to achieve the objective of bringing the kitchen into compliance with health codes and the demands of the Holiday Inn International. Further, he had assisted Flores in improving his cooking techniques. Moreover, qualified help was in short supply. I reject Flores' testimony to the effect that, when he proffered his resignation, Frank Fava was virtually unresponsive and merely acquiescent. I further reject the inferences of Flores' testimony that his relationship with Fava became strained due to the fact that Frank Fava had learned that he, Flores, had endeavored to contact the Union concerning his wages. Rather, I credit the testimony of Frank Fava to the effect that Flores advised him of his intentions to resign, that he endeavored to dissuade him and warned him that he, Fava, would hire a qualified applicant if one became available.

This position, which she held from November 1978 until approximately November 19, 1979, required her to schedule hours of other bartenders, order liquor for bar use, and inventory liquor stocks. During her term of service as bar manager, she had occasion to hire one bartender without clearance from her superior. Her duties as a bartender required her to pour drinks and wait on customers, to cut citrus fruits, and to maintain the cleanliness of the tables and bar. When Bruno Fava assumed management of the hotel facility in early December 1978, he assumed responsibilities for scheduling the hours of work of all bar personnel and rescinded the right of Mastriano to hire. At the outset of her employment in 1978, Mastriano was compensated at a rate of approximately \$4.78 per hour and was increased in her hourly pay when she assumed her responsibilities as bar manager. When Fava became manager of the motel facility, he reduced Mastriano's rate of pay to that provided for bartenders in the collective-bargaining agreement. Mastriano learned of this reduction in her hourly rate on December 20, the first payday following Fava's assumption of management of the hotel facility. Fava explained that her previous compensation had been above union scale and that she had been relieved of her responsibilities to schedule work. Fava added that he would wait and see how she performed her duties as a bartender. Mastriano's hourly rate of pay was raised in May 1979 pursuant to her request when she learned that the night bartender was being paid at a rate above her wage rate.¹³

During the period of her employment at the Vandenberg Inn in 1977 and 1978, as found, Mastriano worked first on the night shift as a waitress and then transferred to the day shift in the same capacity. Marlene Perez was serving in the capacity of coffeeshop manager, and Bruno Fava maintained overall supervision of the coffeeshop and restaurant operation. In the spring of 1978, at a time when Mastriano was working on the day shift in the coffeeshop, Perez was made supervisor of the coffeeshop and this distressed Mastriano. Moreover, Perez and Mastriano carried on a dialog for a period of days concerning the timely completion of side work prior to the end of the scheduled shift. For her part, Mastriano communicated her opposition to the installation of Perez as supervisor of the day shift. Perez had worked at the Vandenberg Inn for a longer period than Mastriano.

On an occasion in May 1978, just prior to the commencement of the lunch shift, Mastriano, Perez, and Bruno Fava sat together at a table in the dining area to discuss the matter. During the discussion, Mastriano became suddenly excited and exclaimed that she wanted to quit. Bruno Fava invited her to do so and she arose and threw a set of keys across the table. Her termination was effectuated that day, and other personnel, including Fava, handled the luncheon shift.¹⁴

¹³ The foregoing is based on the credited and undisputed testimony of Deborah Mastriano.

¹⁴ The foregoing is based on a combination of the testimony of Marlene Perez and Deborah Mastriano. In those instances wherein the testimony of Mastriano differs from that of Perez, I have credited Perez. In this aspect of her testimony, as in others, Mastriano impressed me as tending to embellish and extend her account in a manner which would redound strongly to her advantage and to portray Bruno Fava in an unfavorable light. To the extent that Mastriano's testimony suggests that Fava's atti-

Approximately 6 weeks after Fava assumed management of Respondent's operation, he had occasion to complete a verification of employment form on behalf of Mastriano. The form was submitted to Fava by a bank where Mastriano was seeking a loan. In completing the form, which Fava signed, the following remark was entered: "A very dedicated and responsible person. The remark was written on the face of the form by Bruno Fava.

During the early part of 1979, Fava complimented Mastriano with respect to the ease with which she had gained proficiency as a bartender and the good relationships that she had established with customers. In August 1979 Mastriano verbally informed Fava of her intention to leave her job and to move from the Santa Maria area. Fava attempted to dissuade her from this course of action, advising her that it would be a mistake for her to leave her friends. Fava added that she was doing a very good job as a bartender and there were many opportunities available to her in Santa Maria. Fava advised her to stay on. Mastriano took some time off commencing August 10 and went to San Diego for approximately 4 days during which time she looked for a job. She returned to Santa Maria on August 14 to attend the funeral of a very close male friend. Following the funeral, she went to the Holiday Inn and spoke with Fava who advised her to stay in her current position and to report to work the following day. Mastriano followed Fava's advice.¹⁵

(2) The prelude events

In the summer of 1979 Bruno Fava presented to the executive committee a plan to expend \$60,000 in refurbishing the bar and cocktail lounge with the essential objective of improving its ambiance and seating capacity. In addition, Fava recommended that a stage and dance floor be constructed so that entertainment could be featured. The executive committee approved Fava's recommendation, and construction activities incident to remodeling and refurbishing the existing area commenced in early August. Incident to this a decision was also reached to install a computer bar system which metered the pour of liquor and beverages and conduced to the careful control of drink content and ratio of liquor costs to revenues. This concept was adopted by the executive committee and the remodeling effort continued until the end of October. In the interim, a banquet room adjacent to the dining room was set up as a temporary lounge. The grand opening of the new bar and cocktail lounge occurred on November 2, at which time all construction activity had ceased and only the installation of those connections and fittings to the computer bar remained to be accomplished. This involved work in a backroom separated from the bar by a common wall.

tude and directives were the precursor to her own emotional outburst and severance of employment, I reject it.

¹⁵ The foregoing is based on the credited and undisputed testimony of Deborah Mastriano. While I am convinced that Mastriano overstated the effusiveness with which Fava complimented her in her capacity as a bartender, Fava did not testify in contradiction of Mastriano and I am convinced that the essential thrusts of Mastriano's testimony in this regard is accurate.

In the meantime, and in keeping with the decision of management to modify the character and focus of the bar and cocktail lounge operation, a decision was made to purchase uniforms to be worn by the cocktail waitresses and by Mastriano as a bartender. Dr. Ikola, as a member of the executive committee, made the decision because he considered the wearing of diverse types and style of street clothing by bar and cocktail lounge personnel detracted from the quality image management desired to establish.¹⁶ In this connection, Dr. Ikola, accompanied by his wife and daughter, traveled to Los Angeles and visited a uniform supply shop. Ikola had his daughter model the uniforms and he took pictures of the four that he considered the most appropriate. He returned to Santa Maria with a sample uniform and the photographs which he had taken. At least three of the female employees of the bar operation, including Mastriano, participated in trying on and perusing the sample uniform. This was hurriedly done but resulted in the approval of the participants of the uniform modeled. From the photographs submitted to the executive committee a uniform was selected and ordered. In excess of \$1,000 was expended in purchasing the uniforms.¹⁷

The uniforms arrived just prior to the November 2 opening of the refurbished bar and cocktail lounge. Mastriano tried on her uniform at home on November 2 prior to reporting to work and found the uniform too abbreviated and revealing to suit her. She took her uniform to work and in a conversation with Fava and other personnel she lodged her objections. In substance, Mastriano informed Fava that the uniform was too revealing at the top and so abbreviated in length that it inhibited her from stooping or bending over and performing the incidental bar duties required of her. One of the participants in the conversation suggested that a ruffle be sewn to the uniform and Fava acquiesced, believing that the additional ruffle would be applied only at the neckline. In the meantime, the cocktail waitresses wore their uniforms on duty. Linda Low and Jan Kuhule manifested their distress at having to wear them, and did so both to Mastriano and to Antioque.

In due course, Mastriano wore her uniform, as modified by a ruffle at the neckline and a fringe ruffle applied to the lower portion of the uniform. When Fava observed this, he stated, in effect, that Mastriano had modified the entire appearance of the uniform and that he had given his approval to modifying only the top portion thereof. Albert Lavoie, who at that time was serving as a business agent of the Union and who visited Respondent's facilities frequently in furtherance of his duties, spoke with Mastriano who was wearing her uniform as modified by the ruffles. She took the initiative in informing Lavoie that she objected to the uniform as too revealing. Lavoie suggested that Mastriano speak with Fava concerning the matter, and he stated that he would also talk with Fava. Lavoie did so immediately thereaf-

ter, informing Fava that Mastriano had spoken to him and had objected to the uniform as too revealing. Lavoie asked Fava if the uniform were a standard one, and Fava said that it was standard, but had been modified by the ruffles. He further told Lavoie that the issue was essentially moot because he had given Mastriano permission to place ruffles on the uniform.¹⁸

During the next week on a daily basis, Mastriano communicated to Fava her objection to wearing the uniform. Her objections would be lodged in the form of comments relating to her embarrassment over having to wear the uniform, the unfavorable reactions of her friends and customers, and the fact that the male night bartender did not have to wear a uniform. As a result of these conversations, on or about November 15, Fava instructed Mastriano that she could wear her slacks and blouse, as she had requested. Prior to taking this action, Fava had communicated to Dr. Ikola the complaints of Mastriano and others concerning the uniforms and Dr. Ikola had instructed Fava to make the decision he considered appropriate. He added that he would prefer the uniforms to be worn, if possible.¹⁹

In the month of October, Fava received reports that Mastriano was rolling dice with customers and that significant amounts of money were changing hands. It had been acceptable practice in the bar and during the luncheon period for customers to roll dice with the cocktail waitress for the tip. The reports which Fava received indicated that Mastriano's dice-rolling activities went beyond this practice. In late October he encountered Mastriano in the bar area rolling dice for substantial amount of money. Later he spoke with Mastriano and instructed her that this was an impermissible practice and directed her to cease. Despite his directive to Mastriano, Fava had the impression that Mastriano continued her practice.²⁰

¹⁸ The findings with respect to the conversation between Lavoie and Mastriano are based on a composite of their credited testimony, but I have principally relied on the testimony of Lavoie. In addition, the findings with respect to the conversation between Lavoie and Fava are based upon a composite of their testimony. I am convinced that Fava was inaccurate in his recollection that his conversation with Lavoie did not take place until on or about November 15 and subsequent to the time when he had instructed Mastriano that she could cease wearing the uniform. Because Lavoie was a frequent visitor to Respondent's facility, I am convinced that the conversation between Mastriano and Lavoie would have transpired at a time earlier than the time fixed by Fava for their exchange. Implicit in this finding is the further conclusion that Lavoie spoke to Fava on the matter immediately subsequent to his conversation with Mastriano.

¹⁹ The foregoing findings are based on the credited testimony of Bruno Fava, as augmented by that of Dr. Ikola. Specifically, I credit the testimony of Fava to the effect that his directive to Mastriano that she could cease wearing the uniform transpired in mid-November. In this connection I have considered and credited the testimony of Lisa Ziemba, Kelly Connell, and Brenda Guisinger to the effect that during the final week of her employment while on duty Mastriano wore street clothes and not her uniform. I credit the testimony of Debbie Mastriano only to the extent that it is consistent with the above findings. Moreover, I reject the testimony of Richard McGuinness and Ted Zenich to the extent that it infers that Mastriano was still wearing her uniform on duty on or about November 27 when they had conversations with her.

²⁰ The credited testimony of Bruno Fava supports the foregoing. I have considered the testimony of Deborah Mastriano, Richard McGuinness, and Ted Zenich and conclude that their testimony supports the

Continued

¹⁶ Dr. Ikola credibly testified that cocktail waitresses and bar personnel were wearing clothing of their own choice and, in his opinion, this portrayed a "no class" operation.

¹⁷ The foregoing is based upon a composite of testimony, including that of Dr. Ikola and that of Deborah Mastriano. The essential aspects of the above findings are not in dispute.

Incident to the installation of the new computer bar, Mastriano expressed her opinion to Fava that the customers would not respond favorably to this method of dispensing drinks. Mastriano expressed the feeling that her customers would prefer to see the bartender physically pour the drink. Fava stated his disagreement.

In mid-November McGuinness visited Respondent's facility in one of his routine visits. He was approached by Fava who showed him a list of bartender duties which he had posted and which he had called to the attention of the bar personnel. McGuinness took no exception to the content of the posting. In the course of this conversation, Fava told McGuinness that Mastriano was failing to cut citrus fruits, prepare juices, stock and rotate liquor, and to maintain the general cleanliness of the area in back of the bar. Fava also noted that Mastriano had complained about her uniform. He emphasized that Mastriano's rolling of the dice was too constant and consistent and that he was going to have to change this. He asked McGuinness as a representative of the Union to speak with Mastriano. McGuinness noted that he felt the construction which was then taking place incident to the installation of the computer bar system rendered it very difficult to maintain the cleanliness of the back bar area. McGuinness agreed, however, to speak with Mastriano and he did so on the same day or the day following. In effect, he summarized the nature and substance of Fava's complaints. Mastriano denied the accuracy of Fava's evaluation concerning the condition of the back bar area and her performance of her bartending duties. Additionally, Mastriano asserted that she had ceased rolling dice a week earlier, and she reiterated to McGuinness her objections to the uniform and requested his evaluation of its propriety. McGuinness stated that he felt the uniform was "very attractive" but agreed that without the lace it "would be just a little bit too revealing." McGuinness added that he wished to maintain harmony between management and the Union and its membership. He counseled Mastriano to do all she could to fulfill her duties. During the conversation, McGuinness formulated the impression that Mastriano was upset and very disturbed about something extraneous to the content of their conversation. Mastriano declined to explicate her feelings in this regard.

Following his conversation with Mastriano, McGuinness returned to his office and communicated Fava's complaints and Mastriano's responses to Ted Zenich. He told Zenich that he had studied the list of bartender's duties which Fava had posted and which Fava had requested the bartenders to sign. McGuinness stated that he considered the list satisfactory. He also told Zenich

finding that Fava spoke to Mastriano concerning her rolling of dice. To the extent that the testimony of the latter three individuals suggests that Fava's chastisement of Mastriano pertained solely to her practice of rolling dice for tips, I reject it. The General Counsel introduced no evidence to counter the credited testimony of Bruno Fava to the effect that Mastriano was gambling for significant amounts of money in the bar area of the facility. In his pretrial affidavit Fava did not single Mastriano out as the offender among employees in this regard, but notwithstanding, the totality of the evidence establishes that she did gamble on the roll of the dice and Fava admonished her.

that there appeared to be something disturbing and upsetting Mastriano which he did not reveal to him.²¹

On Saturday, November 17, Fava called Mastriano at her home and requested her to come to the bar to assist in the installation of the dispensing system of the computer bar. Mastriano countered that the installer was scheduled to come in the following evening. Fava contradicted her and stated that installation was to take place that evening. Mastriano communicated her reluctance to come in as requested, and Fava responded that he and the maintenance man would handle the matter themselves. On Monday, November 19, Mastriano reported for duty and spoke with Fava. She told Fava that she wished no longer to be bar manager and to be expected to report for work on weekends when she was not scheduled for duty. She stated her desire to be relieved of responsibility for ordering supplies and scheduling hours of work. Fava stated he would comply with Mastriano's wishes and would handle these matters. Thereafter, Fava took responsibility for these duties. The schedule which he prepared for November 26 changed Mastriano's reporting time from 10 a.m. to 11 a.m. and she was later told that there was no need to open the bar at the 10 a.m. hour.²²

In the week that followed, Mastriano noted a cooling of Fava's attitude toward her. For his part, Bruno Fava formed the impression that, following his directive to Mastriano to cease wagering on the roll of the dice, she had become reticent and cool in her attitude, and the frequency of her complaints about work-related matters had increased.

On November 20 Mastriano complained to Fava that she had not been compensated for 3 hours of overtime work. (Mastriano had received her paycheck the previous day.) Fava explained that he had offset the 3 hours of overtime which Mastriano had worked against a like amount of time off which she had taken. Mastriano was not satisfied with this explanation and Fava offered to pay the overtime.

The following day Zenich appeared at Fava's office. He stated that he wished to talk to Fava. Zenich rarely came in person to the facility. At the outset of the conversation, Zenich broached the subject of Mastriano's uniform. Fava responded that that was no longer an issue because Mastriano had been authorized to wear street clothes. Fava was irritated and raised his voice a bit. He asked Zenich the real nature of his business, and Zenich inquired about the 3 hours' overtime. Fava offered his explanation for withholding the 3 hours of overtime pay.

²¹ The foregoing is based primarily on the credited testimony of Richard McGuinness, as supported by the testimony of Deborah Mastriano. The testimony of Bruno Fava supports in essential aspects the nature and tenor of McGuinness' testimony. In finding that the conversation transpired in mid-November, and not on or about November 27 as the testimony of McGuinness, Zenich, and Mastriano suggests, I do so on the conviction that the incident transpired in the 2-week period when Mastriano was wearing her uniform, as well as the further finding that Mastriano ceased wearing her uniform at least 1 week prior to her November 28 termination.

²² The foregoing is based on the credited testimony of Deborah Mastriano which is not contradicted. The testimony of Bruno Fava supports the finding that the computer bar installation transpired on the approximate date testified to by Mastriano.

Zenich said that Fava would have to pay it. Fava said that it was his word against Mastriano's but that he would pay the overtime. At this point in the conversation, Zenich alluded to Fava's criticism of Mastriano for rolling dice and failing to properly perform all her bartender duties. Fava responded to these comments and Zenich stated that it appeared to him that Fava was harassing Mastriano. Fava also commented that if Mastriano was going to get upset "about every little problem" that perhaps Zenich should find her a job somewhere else. Following some small talk, the meeting ended.²³

After his conversation with Fava, Zenich instructed Mastriano to meet with him in his office the following morning. Mastriano met with Zenich at approximately 9 a.m. on November 22.

At the outset of the conversation, Mastriano expressed the conviction that she was "going to get it" because she had come to the Union's office. Mastriano told Zenich that after he, Zenich, had left the Holiday Inn after speaking with Fava, Linda Guisinger and Lisa Ziemba had come to her and told her that following Zenich's departure from the Union Bnuno had gone into the dining room and remarked, "This big-titted broad, all she knows how to do is wiggle her ass and roll dice." Mastriano produced for Zenich's benefit a napkin on which she had entered some abbreviations to assist her in recalling the contents of Fava's alleged statement.²⁴ In context of this, Mastriano then described in some detail incidents of alleged sexual harassment of her by Fava. She further told Zenich that she had resisted these advances, and she expressed the opinion that her rejection of Fava in this respect had led to Fava's criticism of her work-related activities and conduct.²⁵ Zenich asked Mastriano why she did not bring these matters to his attention earlier, and Mastriano answered that she was afraid of losing her job if she came to the Union. She expressed her conviction that Fava would find a way to terminate her because she had put a hem on her uniform. Zenich instructed Mastriano to go to work. He also advised her that if Fava did terminate her that she should advise Fava that

she had informed him, Zenich, of Fava's sexual harassment of her.²⁶

(3) The events of November 28

On November 28 Mastriano worked as a bartender on her normal 11 a.m. to 6 p.m. shift. She was dressed in slacks and a blouse. Brenda Riley came on duty at 3 p.m. on the afternoon of November 28. Her shift overlapped that of Mastriano and continued on into the night shift of Kelly Connell, who relieved Mastriano as bartender at 6 p.m. Riley had had no previous experience as a cocktail waitress when she entered Respondent's employ at the end of September 1979. Riley testified that she experienced criticism and disharmony when working with Mastriano which she did not experience under other bartenders.

On the afternoon of November 28 when Riley reported to work, she went to the back area of the bar and put her coat away and quickly surveyed the bar area. She observed only a few customers and she then proceeded to the restroom. She was gone approximately 3 or 4 minutes. As she returned she was informed by a male member of the band that Mastriano was upset with her. Riley approached Mastriano to explain her absence. Mastriano stated that in her absence she had had to serve some customers. Riley apologized. At approximately 5 p.m., Joaquin (Zorro) Razo and Edith Souza entered the bar and occupied a table proximate to the waitress station located near one end of the bar. Razo and Souza arrived at a time when Riley had left the bar area for the purpose of obtaining fresh coffee. It was Riley's normal routine to obtain a fresh pot of coffee preparatory to the influx of evening customers. At this point in time, approximately 10 or 15 customers were in the bar and cocktail lounge. Razo and Souza sat for a time at the table without being waited upon. Finally, Mastriano went from behind the bar to the table and served a round of drinks to Razo and Souza. She remained at the table talking and rolling dice with Razo and Souza. She sipped on a glass of wine as she did so. When Riley returned with the pot of coffee, she was again told by a member of the band who was seated in the cocktail lounge that Mastriano was upset with her. Thereupon, Riley approached Mastriano and asserted that she had informed Mastriano that she was going to get coffee. At 5:30 p.m., Connell reported to the bar preparatory to commencing his bartending duties at 6 p.m. Upon entering the bar area, Connell walked directly to the waitress station at the bar. As he reached the station, Mastriano approached him from the table area situated in the cocktail lounge proximate to the waitress station. Referring to Riley, Mastriano called Riley a "bitch" and stated that she had been "sitting on her ass." Mastriano appeared to be "upset" or "agitated." Connell detected the odor of liquor on her breath. Riley overheard Mastriano's comments and he thereafter gave her explanation to Connell regarding her absence from the bar area. Connell left the

²³ The foregoing is based upon the credited testimony of Bruno Fava, as supported in substantive aspects by that of Ted Zenich. As the testimony of Zenich confirms in essential aspects the testimony of Fava regarding the context of their conversation, I find the portion of Fava's pretrial affidavit suggesting that the conversation related solely to the question of uniforms insufficient to warrant a rejection of Fava's testimony concerning this meeting. I specifically credit Fava's testimony that the conversation transpired on or about November 21. I have considered the testimony of Ted Zenich concerning this conversation, and I reject it to the extent that it is inconsistent with the above findings. I also specifically reject the testimony of Deborah Mastriano to the effect that incident to this conversation between Fava and Zenich, Lisa Ziemba came running into the bar and said that Fava was "all upset" at Mastriano because she had gone to the Union. Not only does this accounting have no other evidentiary foundation but in its recorded context is pure hearsay for the purpose of establishing Fava's asserted resentment against Mastriano for having consulted with the Union.

²⁴ Mastriano testified that Guisinger and Ziemba had reported Fava's alleged statement to her soon after it purportedly occurred. Both Guisinger and Ziemba credibly deny this.

²⁵ The incidents of sexual harassment alluded to by Mastriano were the subject of her independent testimony. Bruno Fava denies the conduct attributed to him. If it occurred, the conduct would have been substantial and not insignificant in character.

²⁶ The testimony of Ted Zenich and Deborah Mastriano forms the basis for the findings with respect to the substantive content of the meeting. I do not credit the testimony of Zenich and Mastriano to the effect that this meeting transpired on November 28.

bar and went to the office area to obtain his bank of money for the night shift. This accorded to his normal routine. Connell's departure for the office occurred at approximately 5:40 p.m. In the ensuing several minutes Mastriano intermittently returned to her work station behind the bar and mixed drinks. She would then return to the table occupied by Razo and Souza. On one occasion, she left that table, went behind the bar, mixed drinks, and handed them across the bar to Razo as he stood across the bar near his table. Prior to completing her shift at 6 p.m., Mastriano had taken the proceeds and checks constituting her "bank" from the cash register and had placed the bank on the surface of the working area of the bar near the cash register. Normal routine would have required Mastriano to take the bank directly to the office and deposit it there. When he assumed his bartending duties at 6 p.m., Connell observed Mastriano's bank resting on the work surface where he normally placed his liquor bottles. Mastriano remained in the bar and sat with Razo and Souza at the table they had been occupying. In the interim, however, she received a telephone call from Zenich who asked Mastriano how her workday had gone. Mastriano said that the day had been "hectic" and stated that she "did not know what [was] going to happen" when she turned her bank into the office. After he assumed his bartending duties, Connell observed Mastriano rolling dice. Above the other sounds in the bar, Connell could hear Mastriano's voice and could also hear laughter coming from the table. A round of drinks for Razo and Souza were ordered by Mastriano through Riley with instructions to charge the drinks to Fava's A and P account.²⁷ Connell was aware that Mastriano was off duty, and in his own mind questioned the propriety of an off-duty bartender seeking to charge a customer drink to Fava's A and P account. Accordingly, he questioned Riley, asking her if the charge was intended to go on "Bruno's A and P account." Riley answered in the affirmative. Connell rang up the order on the ticket. Later, Riley placed another order of drinks for the same customers and, in the process of ringing up the order, Connell detected an error in the key annotation specifying the waitress ordering the drinks. Connell placed the ticket beside the cash register awaiting an appropriate time to discuss the matter with Riley. This transpired at approximately 6:45 p.m. Mastriano remained at the table in the bar and her bank remained behind the bar where she had placed it. Subsequently, at approximately 7:05 p.m., Connell had occasion to discuss the ticket with Riley and in the course of that discussion he observed Bruno Fava enter the cocktail lounge through the main entrance. Fava approached the waitress station as Riley and Connell discussed the ticket in question.²⁸

²⁷ For the purpose of maintaining good customer relations and to serve the business interest of management, an advertising and promotions account was maintained. This account, known as "Bruno's tab," or "the house tab," or the "A and P account," was used for the purpose of expressing gratitude to a good customer, or for the purpose of soothing an irate customer with a valid complaint against the quality of service rendered. Some discretion in this regard resides with the bartender. Off duty bartenders have no authority to charge drinks to the A and P account.

²⁸ The foregoing is based on the credited testimony of John Kelly Connell, Brenda Riley, and Ray Biggs. I have considered the testimony of

Fava entered the bar area without prior knowledge of Mastriano's whereabouts or presence there. He knew that she had worked that afternoon and that her shift terminated at 6 p.m. Fava entered the bar area at approximately 7:05 p.m. He walked directly to the waitress station where Connell and Riley were speaking together. Fava did not observe Mastriano's presence in the bar. He spoke briefly to Connell and Riley and inquired how the cocktail hour was proceeding. Connell responded and then continued his discussion with Riley concerning the A and P tab. Fava, who was present, noted that the tab had a notation indicating that the charges on the check had been made to his A and P account. He commented, rhetorically, that he had just come in and Connell answered that he did not know anything about it. He said that it was not his and motioned to the table where Mastriano was seated. Fava turned and observed Mastriano seated at a table near the waitress station. He then took the ticket and walked in the direction of the bandstand. Mastriano approached him and asked to speak with him. Fava listened and Mastriano stated that Riley had let some customers wait unattended for 10 minutes and she had purchased some drinks for them. Mastriano told Fava, in substance, that Riley had sat and conversed with a member of the band instead of attending to her tables. She referred to Riley as a "broad" and a "bitch." Fava then went to the far end of the bar. He motioned for Connell to join him there. Connell did so, and Fava asked Connell again for a further explanation. Connell started to comment but was interrupted by Mastriano who walked quickly the full length of the bar from her table to where Fava and Connell were conversing. As she approached she addressed Connell and instructed him to tell Fava what she had told Connell earlier. Connell started to recount for Fava's benefit the statement which Mastriano had earlier made concerning Riley. However, Mastriano interrupted him, and she spoke in a still louder tone of voice. Mastriano repeated the phrase, "Tell Bruno what I told you," several times in progres-

Deborah Mastriano and Joaquin Razo and credit it only to the extent that it is consistent with the foregoing findings. I am convinced that Mastriano engaged in liberal rationalization and exaggeration in testifying concerning this event, and I conclude upon my observation of him as he testified that Razo, despite his testimony to the contrary, had only a vague recollection of the precise details of the incidents concerning which he testified. Moreover, I am convinced that, contrary to his testimony, he was fully aware of Mastriano's interest in the proceeding and that he testified in a manner designed to assist Mastriano. I reject his testimony. On the other hand, I am convinced upon my observation of Connell as he testified concerning salient events that he endeavored to recount the incidents in which he was a participant accurately and without bias to the interest of any party. I found him a fully credible and convincing witness. Further, despite his association with Bruno Fava, I am convinced as I observed him testify that Ray Biggs gave an accurate and credible description of the activities of Mastriano and Razo which he witnessed in the time period described above. I credit Biggs. Finally, I conclude that Riley endeavored accurately to recall and describe the events involving her on the evening of November 28. From a composite testimony, I conclude that her accounting is essentially accurate, although I infer that her absence from the bar area during the time period approximating 5 p.m. was longer than she recalled. Finally, I have considered the testimony of Bruno Fava with respect to the time of his arrival and ingress into the bar area, and as it further relates to the degree of latitude granted bartenders in the use of A and P tabs. I credit him in this regard.

sively louder tones each time. She appeared highly agitated. Connell was unable to complete his statement to Fava. Connell continued his effort to give an accounting to Fava. Mastriano persisted in her loud interruptions and Fava interjected with the instruction to Mastriano to quiet down and permit Connell to explain. Fava stated that he could only listen to one person at a time. Finally, Connell addressed Mastriano and stated that if she would "shut up" he would be able to comply with her request. Customers were in the bar, and Mastriano's voice had reached a very high pitch. Finally, Fava raised his voice and addressed Mastriano. He stated, in substance, that she should keep her voice down and speak when she was spoken to. He added that he wanted to complete his discussion with Connell. At this point, Mastriano repeated several times in a very agitated manner the question, "What are you going to do, fire me?" In the process she touched Fava once or twice on the arm as she spoke. Finally, Fava responded, "Sweetheart, if that is the way you want it, you're fired. Go." Throughout this interlude Riley was standing nearby.²⁹ Mastriano responded, "I'll get you for this." She repeated this statement and added, "I'll have your ass for this." Fava walked away and as he did so Mastriano shouted that she was going to the Union. Fava responded, "Fine. Go ahead." Fava proceeded directly to his office.³⁰

Mastriano walked back to her table and spoke briefly with Razo and Souza. She informed them that she had been terminated. She then went to Fava's office and knocked on the door. Fava was inside the office seated at his desk. He had locked the door. He was upset and was endeavoring to gain his composure. Upon hearing the knock at the door, Fava walked over to the door, unlocked it, and opened it. He observed Mastriano who put her foot in the door in order to prevent Fava from

²⁹ The foregoing findings are based on a composite of the credited testimony of Bruno Fava, John Kelly Connell, and Brenda Riley. I have carefully considered the testimony of Deborah Mastriano and of Joaquin Razo as that testimony relates to the above incident. I reject that testimony. Razo was not a credible witness, and Mastriano's recounting of the episode impressed me as grossly inaccurate and carefully tailored to omit details which would redound adversely to her interest. At the same time, Mastriano's testimony contained embellishments which would place her actions in the best possible light and distort the conduct of Fava. I specifically reject Mastriano's testimony on direct examination to the effect that in the presence of Connell and Fava at the end of the bar she endeavored in a totally dispassionate and rational manner to acquaint Fava with the background of the charges made to his A and P account and that he precluded any explanation. Moreover, I specifically reject Mastriano's testimony to the effect that in terminating her Fava said, "Yes, I know you have already been to the union. You're through." To credit this testimony would require a conclusion that Fava, Connell, and Riley joined in a conspiracy to perjure themselves and concoct a tale destructive of Mastriano's interests and supportive of that of Fava. I reject this notion. Nothing in my observation of these three witnesses supports the thesis and much in the category of evidence and the observations of this factfinder is consistent with the conclusion, which I reach, that Mastriano conducted herself in the aberrant, agitated, and angry manner found above. Manifestly, as I observed Mastriano as she testified before me at the hearing, she is a person easily moved to emotion and the verge of tears. If there is present in this proceeding an intentional falsification of testimony to support vested interest, the tendency, if not propensity, resided with Mastriano.

³⁰ The foregoing is based on the credited testimony of John Kelly Connell and Bruno Fava. I specifically credit the testimony of Connell with respect to the remarks which Mastriano made to Fava in response to his statement signifying her termination.

closing it. Through the partially opened door, Mastriano said, "I have now got you." In so stating she laughed. Fava responded, "Get out. Please get out." He was able to close the door.³¹

Soon thereafter, Fava placed a telephone call to the Coachman Bar to determine if Ted Zenich was there. He knew that Zenich frequently patronized the Coachman Bar. He learned that Zenich was at the bar, and he went directly to the Coachman and spoke with Zenich. He gave his version of the events which had transpired earlier that evening resulting in the termination of Mastriano. Zenich expressed skepticism that Fava's explanation represented the true reason for terminating Mastriano. Zenich told Fava that Mastriano had spoken to him about Fava's harassment of her and proceeded to recount several incidents of sexual harassment of Mastriano involving Fava. Fava told Zenich that these claims were preposterous. Zenich interjected, "... you've been a thorn in my side all these years." The dialogue continued with Zenich and Fava exchanging recriminations.³²

Thereafter, Fava returned to his office and spoke with Biggs who had come with his wife to the bar for a drink. In substance, Fava told Biggs that he felt that he was being "setup" in connection with the termination of Mastriano. Biggs was a friend both of Fava and of Zenich. He took it upon himself to contact Zenich and went to the Coachman to converse with Zenich. Biggs communicated to Zenich that he had spoken with Fava concerning the conversation which Fava had had with Zenich. He asked what could be done to resolve the matter. In substance, Zenich expressed resentment over the fact that Biggs would approach him in a bar, during leisure hours, concerning the matter in question. Zenich stated that charges had already been filed, and there was nothing he could do about it. He expressed his opinion that the best thing Fava could do was to pay Mastriano off. He mentioned a figure of \$3,000. Zenich recounted to Biggs the information which Mastriano had imparted to him concerning the various instances when Fava had allegedly sexually harassed Mastriano.³³

IV. CONCLUSIONS

A. Prefatory findings

This case arises in context of an effort on the part of Respondent's executive committee and of Bruno Fava, the newly designated manager, to resuscitate the floun-

³¹ The foregoing is based on the credited testimony of Bruno Fava. I have considered the testimony of Deborah Mastriano to the effect that she actually entered Fava's office, conversed with him, and heard and observed him place a telephone call to his attorney. I interpret this testimony as a further example of embellishment calculated to place the conduct of Bruno Fava in the most unfavorable light while strengthening the thrust of the case being presented on her behalf.

³² I credit that portion of the testimony of Bruno Fava and Ted Zenich, which is consistent with the above findings. I specifically reject the testimony of Zenich to the effect that Fava told him in specific terms that he had terminated Mastriano because she had charged drinks to his A and P tab. I credit Fava's testimony to the effect that he summarized for Zenich's benefit the events leading to Mastriano's termination.

³³ The foregoing is based primarily on the credited testimony of Ray Biggs. I have also considered the testimony of Ted Zenich and credit it to the extent that it is consistent with the above findings.

dering Santa Maria enterprise, and to achieve efficiency and cost-effective reorganization of the principal revenue-producing aspects of the operation. The case arises also against the backdrop of our ongoing, essentially arm's-length but generally harmonious relationship between Fava and the principal union officials, on the one hand, and of the Union and Respondent's owners, on the other. No employee or union-sponsored initiative to counter Fava's managerial prerogatives accompanied the transition of Fava from manager of the Vandenberg Inn, a union house, to the Holiday Inn, likewise unionized. Nothing in the background of either Bruno or Frank Fava had revealed a propensity on their part to oppose legitimate involvement of the Union in employment interests; and no evidence of record exists inferring antiunion hostility on the part of Respondent's executive committee, or ownership group. There is no history of unfair labor practices on the part of either Fava or the executive committee, and Fava's management experience at unionized enterprises had spanned many years. Explicit in the record is evidence that Bruno Fava expected efficiency and dedication to duty, and desired adherence to the chain-of-command principle, but not to the exclusion of the Union or the contractual and other legitimate visitation rights of union representatives. In his regard, I conclude that Fava's announced intention to limit the daily visits of the Union's business agent, McGuinness, establishes nothing more than a desire on his part to balance management interest in maintaining productivity and work-time discipline against the rights of employees to be collectively represented. Moreover, the evidence developed by the General Counsel revealing activities on the part of some supervisors and leadership personnel to test the depth of support for the Union among rank-and-file employees is insufficient to show antiunion propensities on Fava's part. Not only does the record suggest that this activity was a spontaneous excursion on the part of a segment of the departmental leadership personnel, but the General Counsel appears to have attached so little weight to the evidence that no allegation of unlawful conduct evolving from this activity was included in the complaint.³⁴

For his part, Bruno Fava impressed me as a strong, confident manager possessed of firmly held notions of operating proprieties and employee work obligations. At the same time, Bruno Fava impressed me also, as I observed him testify at the hearing before me, as an individual of basic goodwill and candid openness. In tandem, so to speak, his uncle, Frank Fava, impressed me as an essentially genteel man of courtly nature and a deeply held sense of commitment to professional standards in the practice of the cooking and culinary craft. Upon my evaluation of Frank Fava I find him to have been a completely honest witness in terms of recounting to the best of his recollection the incidents to which he was a party, and I am convinced that his essential nature is such as to preclude the likelihood that he would have spoken in the profane manner (suggested by the testimony of Castaneda) or that he would act vindictively in personnel or

union matters, as the testimony of Castaneda and Flores would imply.

The initial challenge by an employee through the Union to the "new broom" elements of Bruno Fava's management effort involved Paul Flores and evolved from his honestly held conviction that Bruno and Frank Fava had exploited him in their efforts to modify and improve the kitchen operation to serve their own personal interests and "track record," so to speak. A second challenge, that of the Union relating to the termination of Deborah Mastriano, involves more subtle undercurrents. From the totality of my observation of witnesses called during the 5 days of the instant hearing, I am convinced, subliminally as it were, that there lurks at the foundations of this case a smoldering resentment on the part of Deborah Mastriano relating to elements of her employment experience at the Vandenberg Inn under Bruno Fava and to the delimiting effects of Fava's management policies upon her previous prerogatives, prerequisites, and freedoms as a bar manager and bartender at the Holiday Inn, once Fava assumed management of that enterprise. There exists, as well, as an integral element of this case, a well-disguised, carefully controlled dislike of Bruno Fava on the part of Ted Zenich, the Union's principal officer, deriving from their years of association as management-union adversaries. The threshold conclusion in an analysis of this consolidated matter relating to the termination of Deborah Mastriano, and one not lightly articulated, is that Mastriano carefully orchestrated her termination, building the constituent elements of her case through a process of rationalization, exaggeration, magnification, innuendo, and rumor-mongering so as to enmesh allies through a process of encapsulating hearsay. As I observed Mastriano testify before me at the hearing, it became manifest that she was an emotional woman easily moved to tears. I became convinced, upon careful, painstaking scrutiny of her at the hearing, that these traits had generic origins quite separate from the concurrence of her task of testifying concerning alleged sexual harassment of her by Bruno Fava. During her testimony I became convinced also that Mastriano feigned guilelessness, a characteristic belied by reason of her own not unsophisticated maturity; by her experience as a bartender and waitress in an industry involving the continuous and direct exposure of its personnel to influences, interplay, and effects of contemporary morals and mores; and by the calculated skill with which she inserted into her testimony a stream of consciousness embroidery of hearsay and augmentation.

B. Interference, Restraint, and Coercion

At the outset, I conclude, in agreement with the General Counsel, that in speaking to his employees in December, in the course of his first meeting with the employee group following his assumption of managership at the beleaguered Santa Maria enterprise of Respondent, Bruno Fava unlawfully inhibited employees in their right freely to consult with their collective-bargaining representative concerning terms and conditions of employment by instructing them, upon threat of jeopardizing their job, to follow a chain-of-command procedure and

³⁴ The conduct was not time-barred by Sec. 10(b) of the Act.

to consult first with supervision and management before contacting the Union. This limitation upon the exercise of Section 7 rights violates Section 8(a)(1) of the Act even though it did not exclude the Union entirely from the consultative process and doubtlessly was closely related to a perceived need to bring order out of a chaotic situation. See *JLG Industries, Inc.*, 243 NLRB 540 (1979); *Interstate Transport Security/ Division of PJR Enterprises, Inc.*, 240 NLRB 279, 278 (1979).

It is on the basis of this impermissible instruction, I conclude and find, that the General Counsel, relying on testimony of witnesses favorable to Flores and Mastriano, endeavored to depict Bruno Fava as an overbearing manager bent on willfully disregarding the representative rights of his employees and the prerogatives of the Union as their chosen collective-bargaining representative. The evidence, as I view it, presents a different focus. At the outset, on the facts as I have found them, I discern nothing impermissible in the conduct or statements of either Frank Fava or Bruno Fava, as they involve Richard Castaneda and/or Paul Flores. Contrary to the General Counsel, the statement forming the basis of the 8(a)(1) allegations of the complaint contained no threats, and no implication of adverse consequence to derive from any contact either Castaneda or Flores might make with the Union concerning their wages, hours, or terms and conditions of employment. The limitation imposed by Bruno Fava upon Flores' use of the telephone during the lunch hour rush was entirely lawful and devoid of coercive effect, within the meaning of Section 8(a)(1) of the Act.

C. The Constructive Discharge of Paul Flores

I conclude and find that Respondent constructively discharged Paul Flores by reducing his rate of pay in a manner and to the extent of causing him to proffer his resignation. In this connection I find that the reduction in his hourly rate of pay, disclosed to him on February 20, was the moving cause in Flores' decision to offer his resignation. Finally, I find that Bruno Fava personally intervened in the compensation process on or about February 5 in a manner leading to the reduction in Flores' wage rate to a level below \$4.25, the rate at which Flores was initially compensated after being removed from salary. Thus, the evidence establishes that, upon reviewing the paychecks to be issued on February 5, Fava directed payroll personnel to compensate Flores at a rate below \$4.25. Fava appears not to have been specific as to the lesser amount intended. Pertinent, however, is the fact that the check representing a rate of \$3.60 per hour—a reduction of 73 cents per hour from Flores' previous salary rate cleared—payroll and was issued on February 20 without being countermanded by Fava. The assumption is thus indulged that the \$3.60 rate was the one intended by Fava. Fava was a cost-conscious manager keeping a tight rein on wage levels. The inference to be drawn is that, having issued instructions to payroll concerning Flores' rate of pay, Fava scrutinized the February 20 paychecks, or at least Flores', and that he knew the amount being proffered Flores on February 20 but permitted it to issue. I conclude therefore that Fava intended Flores to be compensated at the wage rate of

\$3.60 contractually accorded fry cooks—an entry level classification. Pointedly, Bruno Fava did not accede to Flores' complaint concerning the extent of his wage reduction, but merely referred him to Frank Fava who, by inference at least, suggested that Flores' proper rate of pay was that paid a fry cook. In due course, Frank Fava relented to the degree of agreeing to effectuate a \$3.75 per hour wage rate, a rate 17 percent below Flores' average hourly rate under salary. Flores was not acquiescent and he submitted his resignation, being unwilling to accept the burdens of the job at the substantially reduced rate of pay. Clearly, in my view, the cut in pay was the moving force in Flores' decision to submit his resignation. Despite Respondent's contention otherwise, the entire context of the record establishes to my satisfaction that the substantial reduction in pay was the factor which rendered the terms and conditions of his employment intolerable to Flores.

In conjunction with the foregoing, I further conclude and find that Bruno Fava caused the reduction in Flores' compensation below \$4.25 because he knew that Flores had endeavored to contact the Union concerning his dispute over overtime compensation and he invoked his decision to place Flores on hourly wages as a cloak for his retributive reduction in Flores' compensation. The elements of a constructive discharge are thus present because the reduction in Flores' wage rate caused, and was intended to cause, a change in his condition of employment sufficient to force him to resign, and these changes were imposed because Flores had resorted to the Union. See *N.L.R.B. v. Holly Bra of California, Inc.*, 405 F.2d 870 (9th Cir. 1969), enfg. 164 NLRB 1112 (1967); *Crystal Princeton Refining Company*, 222 NLRB 1068 (1976). Respondent correctly contends that Bruno Fava had reached a decision to withdraw Flores' salary and compensate him on a hourly basis before he became aware that Flores was endeavoring to gain the interposition of the Union. Moreover, the evidence establishes that Fava chastised Flores for using the telephone during the lunch hour rush and not because he was contacting the Union. However, by reason of the telephone interlude, Fava became fully aware that Flores was resorting to the Union in pressing his overtime compensation claim. In the labor market that existed, and in light of Flores' experience as a cook and his demonstrated willingness to take instructions from Frank Fava in the culinary arts, there existed no discernible reason grounded in objective business considerations for Fava to have accomplished the substantial reduction in hourly compensation which resulted. Frank Fava had leveled no criticism against Flores and had not sought Flores' termination. Only Flores' resort to the Union gives rational explanation for the decision of Bruno Fava to reduce Flores' hourly rate of pay and to acquiesce in a reduction to the level accorded new, relatively unskilled cooks.

Upon the foregoing considerations I conclude and find that the evidence preponderates in favor of a finding that Paul Flores was constructively discharged and Respondent thereby violated Section 8(a)(1) and (3) of the Act.

D. The Termination of Deborah Mastriano

I find that the General Counsel failed to prove by the preponderance of the credible evidence that Bruno Fava terminated Deborah Mastriano because she engaged in union or other protected concerted activities. Rather, I find that Mastriano was terminated for gross insubordination and that Fava acted spontaneously as a consequence of severe provocation provided by Mastriano's loud, repetitive verbal challenges in proximity of customers during business hours. I further find that Fava had not planned Mastriano's termination and that antiunion or legally impermissible motivation arising from Mastriano's involvement in protected concerted activity was nowhere present.

The General Counsel contends that Fava terminated Mastriano because she had complained to the Union on her own behalf, and in the interest of other cocktail waitresses, concerning the nature of the uniforms which they had been instructed to wear, and that these complaints caused Fava to contrive pretexts for justifying Mastriano's termination. I view the record differently and conclude that Fava's asserted anger at Mastriano over the uniform issue was a bogus issue contrived by Mastriano and given credence by Zenich in an effort to launch an assault upon Fava's management techniques and code of discipline which had served to intrude upon Mastriano's past prerequisites as a bartender. The record nowhere supports the notion that in Fava's mind the disenchantment of the cocktail waitresses generally, and the complaints of Mastriano, specifically, with respect to the uniforms, had become a matter of cardinal importance sufficient to justify a showdown. Rather, separate from the carefully orchestrated testimony of Mastriano and Zenich, the record reveals that Fava first endeavored to accommodate Mastriano on the issue of modifying the uniform, later experienced transitory anger over the objections being lodged by Mastriano about the uniform, acquiesced in Mastriano's wearing of the modified uniform, and finally permitted her to cease wearing the uniform entirely. Absent in this case is a sufficient showing on the part of the General Counsel that Fava took any exceptional actions with respect to the uniform issue. He advised Dr. Ikola, the stockholder who had initially selected the uniforms, and then communicated to the cocktail waitresses that Dr. Ikola preferred the uniforms to be worn, if possible. Beyond this he responded in a dispassionate manner to union officials who solicited his response. This falls far short of the *cause celebre* scenario depicted by Mastriano and advanced in support of the complaint by the General Counsel. The purported cooling of Fava's attitude toward Mastriano incident to the uniform complaint has explanation having to do with the self-oriented recalcitrance of Mastriano toward the concept of a computer bar, her refusal to report during a weekend to assist in the installation of a segment of it, and Fava's identification of Mastriano as an employee engaged in gambling on the premises through the roll of dice. In any event, although the record warrants the conclusion that Fava reached a point of exasperation with Mastriano, causing him to welcome a decision on her part to find employment elsewhere, the record, in my view, falls short of establishing that Fava took overt

action to bring her employment to an end. Rather, the totality of the evidence establishes that Fava was being very circumspect not to force the issue of Mastriano's continued tenure and may have been influenced in this respect by the fact that he had once before been charged with a violation of the Act in the effectuation of Paul Flores' resignation, and by the active ongoing interest being demonstrated in Mastriano's complaints by representatives of the Union.³⁵ The relationship in terms of time between the episode involving Flores and the events of November 28 is remote, and supplies no compelling nexus to the action taken with respect to Mastriano. I find on the record as a whole that, on November 28 through words and actions, Mastriano intentionally provoked Fava into terminating her and that Fava responded solely out of agitation and anger generated by Mastriano's conduct during the course of the exchange which took place at the end of the bar in the presence of Connell. I find no violation of the Act evolving from this conduct.

Upon the foregoing findings of fact, and upon the entire record in this proceeding, I make the following:

CONCLUSIONS OF LAW

1. Holiday Inn of Santa Maria is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Culinary Alliance and Bartenders Union, Local No. 703, Hotel & Restaurant Employees and Bartenders International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. By instructing employees not to go to the Union concerning work related problems until after they had discussed the problem with their supervisors and management, and inferring that their jobs would be jeopardized if they did not do so, Respondent interfered with, restrained, and coerced employees in the exercise of rights guaranteed them in Section 7 of the Act and engaged in conduct in violation of Section 8(a)(1) of the Act.
4. By substantially reducing the hourly wage rate of Paul Flores because he had consulted with the Union concerning a dispute over the amount of overtime compensation due him, Respondent constructively terminated Flores on March 2, 1979.
5. Respondent engaged in no other conduct violative of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent constructively discharged Paul Flores on March 2, 1979, I shall recommend that Respondent be ordered to offer Flores imme-

³⁵ Moreover, if Fava had been guilty of a process of sexual harassment involving Mastriano it is doubtful that in the face of union interest in Mastriano's other complaints he would have nonetheless carefully planned her termination thus inviting her wrath and legal recourse.

diate and full reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings which he may have had as a result of the discrimination against him. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER³⁶

The Respondent, Holiday Inn of Santa Maria, Santa Maria, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Instructing employees to refrain from contacting or consulting with the Union, or representatives thereof, with respect to problems or other matters relating to their terms and conditions of employment until after they have consulted with supervision or management, and inferring that their jobs would be in jeopardy if they did not do so.

(b) Constructively discharging employees.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

³⁶ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections hereto shall be deemed waived for all purposes.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer Paul Flores immediate and full reinstatement to his former position of employment or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay or other benefits he may have suffered by reason of the discrimination against him, in the manner described in the section of the Decision entitled, "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Santa Maria facility copies of the attached notice marked "Appendix."³⁷ Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by a representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

³⁷ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."